IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEPHEN BLAIR CLARK, Appellant.	No. 32852-6-II UNPUBLISHED OPINION

VAN DEREN, A.C.J. — Stephen Clark appeals his conviction for second degree attempted rape, arguing that (1) the information was constitutionally deficient; (2) two witnesses improperly discussed their testimony; (3) he received ineffective assistance of counsel when his attorney failed to object to the jury instructions; and (4) cumulative error warrants dismissal. Finding that the information was constitutionally deficient, we reverse and dismiss without prejudice.

FACTS

On August 14, 2004, Rachena Casper and three of her friends went to Seven Cedars Casino for a bachelorette party in honor of Casper's friend, Elisheba Haxby. The group planned to stay at the Discovery Bay Resort Condominiums the night of the party.

While at the casino, Casper and Haxby separated from their friends. When the two other women rejoined Casper and Haxby, they told them that Ivanhoe Keo and Clark had volunteered to strip dance for the group.

Casper telephoned Keo and Clark, both of whom agreed to meet the women at the condominium. Once there, the two men proceeded to dance for the women. Keo danced for Haxby; Clark danced for the other three women.

Shortly thereafter, Casper went downstairs to go to bed. She could not get into the bedroom because it had been locked from the inside, so she went outside and climbed through the bedroom's outside window. Once in the room, Casper went to sleep.

Haxby later went to the downstairs bedroom to sleep as well, but the door was locked. Haxby pounded on the door and tried to rouse Casper to gain entrance. Clark came downstairs and offered to help Haxby get into the room by using a butter knife. Haxby briefly attempted to open the door with the knife but could not so she instead went to an upstairs bedroom to sleep.

Casper awoke to find Clark on her back. He put his hand over her face and said "I'll crush your skull, Bitch, if you move." Report of Proceedings at 52-53. Casper fought with

Clark, but he removed her outer clothing and underwear. Casper kicked him, screamed, and managed to run for the door. Clark tried to pull her back to the bed and she fell to the floor. At that point, her friends came to the door[1] and Casper ran upstairs and locked herself in another bedroom. Casper and her friends called the police. Clark fled the condominium; the police later apprehended him.[2]

The State charged Clark by information with second degree attempted rape. The information stated in pertinent part: "On or about the 15th day of August, 2004, in the County of Jefferson, State of Washington, the above-named Defendant did attempt by taking a substantial step to engage in sexual intercourse by forcible compulsion . . . contrary to Revised Code of Washington 9A.44.050(1)(a) and 9A[.]28.020." Clerk's Papers at 16-17.

A jury found Clark guilty of second degree attempted rape and the court sentenced him to 71.25 months to life.

ANALYSIS

Clark argues for the first time on appeal that the information was insufficient because it did not contain the required intent element of attempted second degree rape.

In order to be sufficient, a charging document must include all essential elements,

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[1] Initially Casper testified that Haxby came to the door. She later changed her testimony and said that it was a different friend that came in.

[2] Clark and Keo told the women that they had to hitchhike to the condominium because they had a flat tire. Police found an abandoned vehicle registered to Clark that had a flat tire. Police conducted a Department of Licensing (DOL) search on Clark and found that Clark's DOL physical description matched the description the women provided.

statutory or otherwise, of the crime charged. *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885

(2005) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)). This affords the accused notice of the nature and cause of the accusation against him and allows him to properly prepare a defense. *Tinker*, 155 Wn.2d at 221 (quoting *Kjorsvik*, 117 Wn.2d at 97); *State v. Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). An essential element is "'one whose specification is necessary to establish the very illegality of the behavior,' but the charging document need not repeat the exact language of the statute." *Tinker*, 155 Wn.2d at 221 (citing *State v. Leach*, 113 Wn.2d 689, 686, 782 P.2d 552 (1989)).

If the defendant challenges the information before the verdict, the trial court must strictly construe the document to determine whether all of the crime's elements are included. *Tinker*, 155 Wn.2d at 221. But where, as here, the defendant challenges the charging document for the first time on appeal, we apply a more liberal standard. *Goodman*, 150 Wn.2d at 787.

Our Supreme Court has adopted a two prong test to determine whether an unchallenged charging document is insufficient: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *Goodman*, 150 Wn.2d at 788 (quoting *Kjorsvik*, 117 Wn.2d at 105-06).

Under the first prong, we look only at the face of the charging document and construe it according to common sense to include necessarily implied facts. *Goodman*, 150 Wn.2d at 788. But where a necessary element cannot be found or reasonably implied in the information, we presume prejudice and must reverse without resort to the second prong. *State v. McCarty*, 140

Wn.2d 420, 425, 998 P.2d 296 (2000).[3]

We recently addressed the strict requirement that in order to avoid reversal, the charging document must include all necessary elements. *State v. Courneya*, 132 Wn. App. 347, 350, 131 P.3d 343 (2006). In *Courneya*, the State's information did not include the knowledge element for hit and run and no words in the information implied the existence of a knowledge element. *Courneya*, 132 Wn. App. at 352. Although Courneya was tried twice with proper jury instructions, and the State argued that the public policy and purpose of the essential elements rule had been served, we reversed and dismissed without prejudice based on compelling Washington authority. *Courneya*, 132 Wn. App. at 354-55; *see also McCarty*, 140 Wn.2d at 426 (information charging conspiracy to deliver methamphetamine was insufficient because it did not allege the essential element that three people be involved in the conspiracy); *State v. Vangerpen*, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995) (omission of a statutory element in the charging information cannot be considered a mere technical error); *State v. Franks*, 105 Wn. App. 950, 958-59, 22 P.3d 269 (2001) (information insufficient when it included defendant's name in the caption but not in the documents charging language); *State v. Gill*, 103 Wn. App. 435, 442, 13 P.3d 646 (2000) (a missing element in one count cannot be drawn from its proper inclusion in another similar count).

Here, the State charged Clark with second degree attempted rape. RCW 9A.44.050

[3]The second prong requires the accused to prove that he was actually prejudiced as a result of the language in the document and that he did not receive notice of the charges. *State v. Goodman*, 150 Wn.2d 774, 789, 83 P.3d 410 (2004). For the second prong, we may look to outside information to determine actual prejudice. *Goodman*, 150 Wn.2d at 789.

governs second degree rape and states in pertinent part: "(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: (a) By forcible compulsion . . . ."

RCW 9A.28.020 governs criminal attempt and states in pertinent part: "A person is guilty of an attempt to commit a crime if, with *intent* to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." (Emphasis added).

"Where a crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result." *State v. Dunbar*, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). Because rape is an act causing a particular result, intent is an element and the State must prove and charge that the accused intended to cause that result. *See Dunbar*, 117 Wn.2d at 590.

Here, intent does not appear in any form in the information, nor can it be implied from the document's language. And the mere citation to the statute is not enough. *Vangerpen*, 125 Wn.2d at 787. Because intent is an essential statutory element of attempted second degree rape and the information did not charge intent, we find the information fatally flawed.

The dissent cites to Division One's holding in *State v. Gallegos*, which upheld an attempted rape conviction where the charging information did not include the elements of attempt. 65 Wn. App. 230, 235, 828 P.2d 37 (1992). But the facts of *Gallegos* differ substantially from the facts here. Gallegos was charged by deficient information[4] with second

[4] The information did not include the sexual intercourse element, which is an essential element.

degree rape and not with attempted rape. But the jury convicted him of attempted rape as a lesser included offense of second degree rape. After the jury returned its verdict, the State amended the information and charged Gallegos with attempted second degree rape.[5]

On appeal, Gallegos argued that because the initial information was deficient, and was not properly amended, he could not be convicted of the lesser included offense. *Gallegos*, 65 Wn. App. at 235. Division One agreed that the original information was faulty, but found that he could still be convicted of attempt because engaging in sexual intercourse was not an element of attempted second degree rape; the crime for which the jury convicted Gallegos. *Gallegos*, 65 Wn. App. at 235. Further, the court found that the original information was sufficient because the term "forcible compulsion" encompassed the elements of intent and substantial step. *Gallegos*, 65 Wn. App. at 235.

A defendant may always be found guilty of an "offense the commission of which is necessarily included within that with which he is charged in the indictment or information." RCW 10.61.006. In other words, a defendant may be convicted of a crime for which he has not

[5] The State may not amend the information after it has presented its case in chief unless the amended document charges a lesser included offense of the original charge. *State v. Gallegos*, 65 Wn. App. 230, 234, 828 P.2d 37 (1992).

been charged, so long as it is a lesser included offense of the crime he is charged with. Thus, under RCW 10.61.006 Gallegos could rightfully be convicted of the lesser included attempt crime.

In contrast, here, Clark was not convicted of a lesser included offense, rendering *Gallegos* inapposite. Further, in light of more recent case law dictating that the information must include all of the essential criminal elements, we do not follow the statement in *Gallegos* that forcible compulsion encompasses the essential elements of intent and substantial step. *See, e.g., Courneya*, 132 Wn. App. at 346 (the charging information is insufficient where it fails to include the required knowledge element).

Because we reverse and dismiss based on the deficient charging document, we do not address Clark's additional arguments.

We reverse and dismiss without prejudice.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, A.C.J.

I concur:

Armstrong, J.

Hunt, J. — (dissenting) I respectfully dissent from the majority's holding that the information was constitutionally deficient and warrants reversal.

It is undisputed that neither before nor during trial did Clark ask for a bill of particulars or challenge the information as insufficient to provide notice of the charged crime. On the contrary, he waited until after trial and verdict to raise the issue of the information's sufficiency for the first time. He now argues on appeal that the trial court erred in denying his post-trial motion to dismiss the information. I would affirm the trial court's denial of this motion, together with Clark's conviction.

I. Standard of Review

"[I]t has never been necessary to use the exact words of a statute in a charging document; it is sufficient if words conveying the same meaning or import are used." *State v. Kjorsvik*, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). Such is the case here. Furthermore, that the information "does not define every element that the State must prove at trial does not render the information constitutionally defective," so long as the information sufficiently apprises an accused person with reasonable certainty of the nature of the accusation. *State v. Rhode*, 63 Wn. App. 630, 635, 821 P.2d 492 (citing *State v. Smith*, 49 Wn. App. 596, 599, 744 P.2d 1096 (1987), *review denied*, 110 Wn.2d 1007 (1988)), *review denied*, 118 Wn.2d 1022 (1991).

Moreover, as the majority acknowledges, where, as here, a defendant waits to challenge the sufficiency of an information after the fact finder has reached a verdict, we apply a liberal standard of review, *States v. Goodman*, 150 Wn.2d 774, 787, 83 P.3d 410 (2004), in favor of

concluding that the information informed the defendant of all the elements of the crime. *See Kjorsvik*, 117 Wn.2d at 110-11 (information charging that defendant unlawfully, with force, and against the victim's will, took money while armed with a deadly weapon is sufficient to inform the defendant that "intent to steal" was an element of robbery). In my view, it is not possible that the information failed to inform Clark of all the elements of the crime. Applying the applicable standard of review, I would hold that the information passes the *Kjorsvik* test.

II. Sufficiency of the Information

A. Necessary Facts in Charging Document—First Prong of *Kjorsvik* test

Here, the "necessary facts appear . . . in the charging document." *Kjorsvik*, 117 Wn.2d at 105. "Thus, the information satisfied constitutional notice requirements." *State v. Gallegos*, 65 Wn. App. 230, 235, 828 P.2d 37, *review denied*, 119 Wn.2d 1024 (1992).

The amended information sufficiently charged Clark with attempted second degree rape. The information alleged that Clark "did attempt by taking a substantial step to engage in sexual intercourse by forcible compulsion R.L.C. . . .; contrary to Revised Code of Washington 9A.44.050(1)(a) and 9A[.]28.020." Clerk's Papers (CP) at 16-17. This language expressly charged "attempt" under RCW 9A.28.020, which, by definition, includes "intent to commit a specific crime,"[6] here, second degree rape.

That an information alleging attempted rape does not include the word "intent" in the

[6] RCW 9A.28.020(1) defines "attempt" as follows: "A person is guilty of an attempt to commit a crime if, *with intent to commit a specific crime*, he or she does any act which is a substantial step toward the commission of that crime." (Emphasis added.)

charging language does not render it constitutionally deficient. On point is Division One's

opinion in *Gallegos*, affirming a conviction for attempted second-degree rape:

> Gallegos . . . contends that the original information was defective because it . . . failed to allege that he intended to commit rape or took a substantial step toward committing rape. *See* RCW 9A.28.020. As previously noted, the information alleged that Gallegos "by forcible compulsion did attempt to engage in sexual intercourse with another person, named [T.G.]." Attempting to engage in sexual intercourse by forcible compulsion encompasses the elements of intent and a substantial step.

Gallegos, 65 Wn. App. at 235.

Here, the charging language, "did attempt by taking a substantial step to engage in sexual intercourse by forcible compulsion," more completely defined "attempt" than did the information upheld in *Gallegos* because, unlike in *Gallegos*, the information specifically alleged that Clark took "a substantial step," an omission about which Gallegos unsuccessfully complained on appeal. Following *Gallegos*, I would similarly conclude, contrary to the majority's holding here, "that the necessary facts appear in some form and by fair construction can be found in the charging document," *Gallegos*, 65 Wn. App. at 235, thus passing the first prong of the *Kjorsvik* test.

B. No Prejudice—Second Prong of *Kjorsvik* test

In addition, again, as in *Gallegos*, Clark "has not alleged that he was prejudiced by any of the alleged defects [in the amended information]. See *Kjorsvik*, [117 Wn.2d] at 110." *Gallegos*, 65 Wn. App. at 235. Thus, the information also passes the second prong of the *Kjorsvik* test.

Clark not only failed to claim any surprise or prejudice flowing from the information at trial, but he also claimed that he had lacked specific intent to commit rape because his sexual intercourse with the victim was consensual, which he ceased when she asked. That Clark was

able to mount his defense to the specific intent element of attempted rape in this manner belies his post-verdict assertion that the charging language of the information was insufficient to apprise him of the charges against him.[7]

The law is well settled in Washington that when the charging document sufficiently gives the defendant reasonable notice of the elements of the charge against him, and he suffered no prejudice from the manner in which the crime was charged, there is no reversible error. *Kjorsvik*, 117 Wn.2d at 111.

I would affirm.

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Hunt, J.

[7] Moreover, similar to *Kjorsvik*, it is not reasonably conceivable that Clark could have attempted to engage in sexual intercourse by forcible compulsion and yet not have intended to rape the victim.